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No. 80-1066

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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**UNITED STATES OF AMERICA,**

*Respondent,*

vs.

**ROGER S. BASKES,**

*Petitioner.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

A. Can A Government Agency Obtain Inculpatory Evidence Against An Attorney By Committing An Intentional Illegal Search And Seizure Against His Client And Thus Circumvent The Constitution's Guarantee Of Due Process Of Law?

B. Should This Court Reconsider Its Decision In *United States* v. *Payner* Which Engrafted An Unprecedented Standing Requirement Upon A Federal Court's Supervisory Powers?

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### I.

### OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported; *United States* v. *Baskes,* slip op. 79-1774 (7th Cir. October 23, 1980). That opinion is filed with this Court as Appendix A. The order of the district court is unreported and is filed with this Court as Appendix B.

## II.

## JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 23, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## III.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

## IV.

## STATEMENT OF THE CASE

In 1977, a federal grand jury returned an indictment against petitioner, Roger S. Baskes, charging him with conspiracy and wilfully aiding in the preparation of false income tax returns. Petitioner was a senior partner in a major tax law firm located in Chicago. In 1973, two individuals, Melvin Garb and Harold Stern, sought tax advice from petitioner, in that they had obtained large capital gains which they were seeking to shelter from taxation. Petitioner advised engaging in currency futures trading as a tax planning device. Subsequently, a trading account

was established for Garb and Stern with William Goldstandt, a commodities merchant at the Chicago Mercantile Exchange. Trades were executed by Goldstandt on behalf of Garb and Stern, which resulted in substantial financial losses. Petitioner then advised the tax preparer for Garb and Stern to report the commodities transactions on their respective tax returns as short-term capital losses.

At trial, the government sought to prove that petitioner had conspired to prearrange the commodities trades to insure specific losses, with the gains accruing to trust accounts in Castle Bank and Trust in the Bahamas. Further, the government sought to establish that the trusts were actually held for the benefit of Garb and Stern, and that a foreign citizen was deceived into acting as a trustee for the accounts to avoid United States reporting requirements. Finally, the government claimed that petitioner advised Garb and Stern to use the futures trades as short-term capital losses, when he knew that no actual losses occurred and that the funds were located in the offshore trust accounts.

The necessary and critical evidence the government intended to present was obtained directly from leads derived from material seized by the Internal Revenue Service in the famous "briefcase caper" and rolodex seizure discussed in *United States* v. *Payner*, ..... U.S. ..... Prior to trial, petitioner therefore moved to suppress this evidence on two separate grounds: 1) that it had been obtained in an illegal and unconstitutional manner and must be suppressed pursuant to the district court's supervisory powers; and 2) that the use of such illegally obtained evidence would violate his constitutional right to due process of law. The district court stayed its decision until after trial. Petitioner then was found guilty after a jury trial.

Following the verdict, petitioner renewed his motion to suppress. Both parties submitted a written stipulation, along with numerous exhibits, concerning the facts of the "briefcase caper," the theft of the rolodex and the degree to which their fruits constituted government evidence in this case. The facts surrounding the search were slightly different from those discussed in *United States* v. *Payner*, ..... U.S. ..... Here, petitioner was a specific subject of the investigation and his client was the direct object of the briefcase search. The government admitted that the purpose of the search was to obtain inculpatory evidence against petitioner. In addition, petitioner's law firm represented the offshore bank, Castle Bank & Trust, and he had had numerous business dealings with Michael Wolstencroft, the person whose briefcase was illegally seized. Further, the briefcase contained attorney-client correspondence between Castle Bank and petitioner's law firm.

After hearing oral argument, the district court granted petitioner's motion to suppress. (App. B) Specifically, the court suppressed the testimony of William Goldstandt, Melvin Garb and Harold Stern; all evidence, either testimonial or documentary, concerning the commodities trading accounts of Garb and Stern; and all other evidence derived directly or indirectly from the Wolstencroft briefcase or the rolodex. The court then set aside the jury's guilty verdict.

The government appealed the district court's order to the United States Court of Appeals for the Seventh Circuit. Petitioner cross-appealed, claiming that the district court erred in finding that he had no standing to challenge the illegal evidence on the grounds that its use violated his constitutional right to due process of law. Pending appeal, this Court decided *United States* v. *Payner*, ..... U.S. ..... The Seventh Circuit then ordered petitioner

to show cause why the district court's suppression order should not be reversed and remanded in light of *Payner*. Petitioner argued that the due process issue raised here was neither raised in the government's petition for certiorari in *Payner*, nor necessary to this Court's holding in *Payner*. Accordingly, petitioner contended that the due process basis for his motion to suppress was not foreclosed by the *Payner* decision.

The court of appeals nevertheless reversed the district court's suppression order and remanded the case for further proceedings.

## V.

## THE MANNER IN WHICH THE FEDERAL CONSTITUTIONAL CLAIMS WERE RAISED

Petitioner first asserted the Fifth Amendment by making a pre-trial motion to suppress government evidence as being illegally obtained in violation of his right to due process of law. Petitioner also urged that the evidence be suppressed under the court's supervisory powers. The district court stayed its decision on the motion until after trial. Following a trial on the merits, petitioner renewed his motion to suppress. The district court granted petitioner's motion to suppress by invoking its supervisory powers to exclude the government's evidence, but refused to grant the motion based on due process grounds. The district court then set aside the jury's guilty verdict.

The government appealed the district court's order to the United States Court of Appeals for the Seventh Circuit. Petitioner cross-appealed on the district court's decision concerning the due process issue. Following this

Court's decision in *United States* v. *Payner*, ..... U.S. ....., the court below entered an order requesting petitioner to show cause why the district court's decision should not be reversed and remanded in light of *Payner*. Petitioner submitted a memorandum and again raised the due process issue, arguing that it had not been resolved by *Payner*.

On October 23, 1980, the Seventh Circuit reversed the district court's order and remanded the case for further proceedings.

## VI.

## REASONS FOR GRANTING THE WRIT

### A. TO DETERMINE WHETHER AN ATTORNEY WHO IS THE TARGET OF A GOVERNMENT INVESTIGATION HAS STANDING TO SUPPRESS EVIDENCE ILLEGALLY SEIZED FROM HIS CLIENT ON THE GROUNDS THAT ITS USE AGAINST THE ATTORNEY WOULD VIOLATE HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

The Internal Revenue Service was conducting an investigation of off-shore tax havens. Included among their targets were Castle Bank and Trust-Bahamas, petitioner, and his law firm, which represented the Bank. As part of that investigation, IRS agents broke into an apartment and stole the briefcase of Michael Wolstencroft, an officer of the Bank. The purpose of the IRS search and seizure was to obtain inculpatory evidence against the Bank's attorney, petitioner. The government presented information derived from the seized material as evidence at petitioner's trial for income tax charges. The charges pertained to tax advice given by petitioner to another of his clients. Another officer of the Bank, Anthony Field, was named as a co-defendant. Petitioner urged that the constitutional guarantee of Due Process of Law prohibited the use of the product at his trial.

In *United States* v. *Payner*, ..... U.S. ....., this Court held that a federal court, utilizing its own supervisory powers, could not suppress evidence illegally seized in the manner set forth above on the basis of a defendant's Fourth Amendment rights. This Court, however, was

neither presented with, nor resolved the issue of, whether such evidence should be suppressed to assure the defendant's Fifth Amendment right to due process of law.[1]

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[1] The due process issue presented here was not reached by the court of appeals in *Payner, see United States* v. *Payner*, 590 F.2d 206 (6th Cir. 1979) (per curiam), nor raised by the government in its petition for certiorari. This Court's past opinions and its own rules thereby precluded the decision of this important constitutional issue. *Andrews* v. *Louisville & Nashville R.R., Co.*, 406 U.S. 320 (per Rehnquist, J.); *J.I. Case Co.* v. *Borak*, 377 U.S. 426; U.S. Sup. Ct. R. 23(1)(c); *cf. Stone* v. *Powell*, 428 U.S. 465 (per Powell, J.) (refusing to be bound by past precedents concerning issues which the Court decided that were not in the petitions for certiorari); *see generally* Director, *Construction and Application of Rule 23 of Rules of Supreme Court Prescribing Requirements of Petition for Certiorari*, 32 L.Ed.2d 830 (1972). Further barring this Court's resolution of the due process issue in *Payner*, is its own well-stated policy of refraining from deciding issues not fully briefed nor argued by the parties. *See Usery* v. *Turner Ellshorn Mining Co.*, 428 U.S. 1; *see also Wood* v. *Strickland*, 420 U.S. 308 (per White, J.).

Moreover, this Court does not decide constitutional questions of law unless they are "absolutely necessary to the decision of the case" before it. *Ashwander* v. *TVA*, 297 U.S. 288, 346 (Brandeis, J. concurring); *accord, Jackson* v. *Virginia*, 443 U.S. 307, 326 (Stevens, J., concurring); *Poe* v. *Ulman*, 367 U.S. 497; *Rescue Army* v. *Municipal Court of the City of Los Angeles*, 331 U.S. 549, 566-570 & n.34 and Supreme Court cases cited therein. In *Payner*, resolution of the due process issue was totally unnecessary to this Court's holding: the Court had only to rule that the court of appeals erred in affirming the district court's suppression of the evidence on the basis of its supervisory powers. There was no need to adjudicate the due process issue and thus "formulate a rule of constitutional law broader than . . . [was] required by the precise facts to which it [was] . . . to be applied. . . ." *Ashwander* v. *TVA*, 297 U.S. 288, 346 (Brandeis, J. concurring). Indeed, it would be more than just ironic should this Court reach out to unnecessarily adjudicate a constitutional issue in a case such

(footnote continued)

This Court has never had the opportunity to fully discuss and adjudicate the important constitutional question concerning the extent to which standing requirements limit the Fifth Amendment right to due process of law. Indeed, prior to *United States* v. *Payner*, where the due process issue was not properly before the Court, this question had only been mentioned once by this Court in 200 years of constitutional adjudication. *See Hampton* v. *United States*, 425 U.S. 484, 490 (plurality opinion) (dicta).[2] The instant case therefore presents this Court with its first opportunity to review fully the issue of standing requirements and the scope of due process of law.[3]

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(footnote continued)

as *Payner*, where it bolstered standing requirements—a well-recognized doctrine which precludes unnecessary constitutional adjudication. *See generally Sierra Club* v. *Morton*, 405 U.S. 727; *Flast* v. *Cohen*, 392 U.S. 83; *Baker* v. *Carr*, 369 U.S. 186.

Finally, it is well established that this Court does not decide important constitutional questions, such as that presented here, "by cursory dicta inserted in unrelated cases." *Permian Basin Area Rate Cases*, 390 U.S. 747, *reh. denied sub. nom., Bass* v. *F.P.C.*, 392 U.S. 917.

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[2] Compare the development of the standing requirement of the Fourth Amendment—starting with *Jones* v. *United States*, 362 U.S. 257; *Simmons* v. *United States*, 390 U.S. 377; *Mancusi* v. *DeForte*, 392 U.S. 364; *Alderman* v. *United States*, 394 U.S. 165; *Combs* v. *United States*, 408 U.S. 224; *Brown* v. *United States*, 411 U.S. 223; *Rakas* v. *Illinois*, 439 U.S. 128; *United States* v. *Salvucci*, 48 U.S.L.W. 4881 (Sup. Ct.) (overruling *Jones* v. *United States*)—an area in which this Court followed its long tradition of allowing "new rules of law to emerge from the case-bycase adjudication of constitutional issues. . . ." *Jackson* v. *Virginia*, 443 U.S. 307, 327 (Stevens, J., concurring).

[3] In contrast to *Payner*, the petitioner specifically raised the due process issue in the court below and now raises it again in this Court.

A standing requirement for the Fifth Amendment, as suggested by *Payner,* and as held by the court of appeals below, would strip American citizens of all potential protection against random and illegal searches and seizures. Presently, an individual cannot object under the Fourth Amendment to evidence obtained through illegal searches of others. *Rakas* v. *Illinois,* 439 U.S. 128. This, perhaps, is reasonable. Such a requirement merely prevents the exclusion of relevant evidence because of a technical deficiency in a warrant, or a good faith error by a law enforcement official. A Fifth Amendment standing requirement, however, would prevent an individual from objecting to truly unconscionable searches—those which "shock the conscience." *Rochin* v. *California,* 342 U.S. 165.

Regardless of the particular search, whether it be surgical removal of evidence, as in *Rochin,* or planned governmental criminality, as here, the government's behavior would always evade review. Such wide latitude would allow the government to intercept personal family communication; private business documents; medical reports; or, as here, attorney-client correspondence, in their free-wheeling search for evidence. In essence, this allows the government to do indirectly what it is prohibited from doing directly: search any place or seize any document, in any way necessary, without regard for a citizen's "legitimate expectation of privacy," to obtain evidence against a criminal suspect.[4]

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[4] Examples of the type of behavior that would evade review without the stopgap protection of due process of law multiply readily: police could follow a suspect's wife, pull her aside, and search and seize her purse to obtain evidence against her husband; or federal agents could tap an attorney's phone, or break into his office and search his files, to obtain evidence against his clients.

(footnote continued)

In *United States* v. *Payner*, ..... U.S. ....., the government, in its petition for certiorari, stated:

> [T]he district court's use of its supervisory powers to accomplish indirectly what the Court frankly conceded it was powerless to do directly under the Fourth Amendment, and the court of appeals' approval of the district court's exercise of that power without any effort to explain its appropriate bounds, shows this application of supervisory power to be essentially a standardless, "chancellor's foot" judicial veto over practices of the Executive Branch that the trial judge finds personally distasteful. The courts below have used the supervisory powers as nothing more than a rubric, a judicial "wild card" to impose sanctions on the government not otherwise justified by precedent. This is a development that warrants this Court's review. *United States* v. *Payner, Govt's Pet. for Cert.* at 20-21.

The court of appeals' decision below now swings the judicial pendulum to the opposite extreme. The lower court's decision frankly allows the government to do indirectly what it is prohibited by the Constitution to do directly, that is, engage in criminal searches and seizures to obtain evidence in criminal proceedings. Without any effort to explain any appropriate bounds or limits to be placed on the government, the court allows the executive branch to employ its own standardless, "chancellor's foot" to commit acts the framers of the Constitution not only believed to be

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(footnote continued)

The possibility of civil or criminal actions against law enforcement officers would act as little or no deterrent against such activities. Indeed, here the IRS agent in question not only was not prosecuted, he was promoted. Similarly, two FBI agents accused of authorizing nine illegal break-ins in the early 1970's recently received "light fines" after being convicted of this illegal activity. *See* N.Y. Times, Dec. 16, 1980, §1, at 1, col. 5.

personally distasteful, but obnoxious and unfitting in a democratic society. The lower court's decision to engraft a standing requirement onto the Due Process Clause of the Fifth Amendment also is clearly "not justified by precedent." Indeed, it merely takes the "wild card" out of the trial court's hands and slips it under the table to law enforcement officials and their various "informers."[5] This certainly is a development that warrants this Court's review.

The Fourth Amendment has long protected our citizenry against unreasonable searchse and seizures. U.S. Const. Amend. IV. In granting this protection, the framers of our Constitution "conferred [upon us], as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States,* 277 U.S. 438, 471, 478 (Brandeis, J., dissenting). Similarly, the Fifth Amendment's guarantee of due process of law has long protected our citizenry against illegal government behavior, including unconscionable searches or coerced testimony. *See, e.g., Rochin* v. *California,* 342 U.S. 165; *Adamson* v. *California,* 332 U.S. 46. Indeed, the guarantee of due process of law has served as a valued "restraint on legislative as well as the executive and judicial powers. . . ." *Murray's Lessee* v. *Hoboken Land & Improvement,* 18 How. 272 (Curtis, J.).

Against this historical tradition, the government's criminal behavior in this case must be measured. In determin-

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[5] The Justice Department now shows indications of playing the recently acquired "wild card." In official guidelines released on December 4, 1980, the Department authorizes informers to participate in crimes while assisting federal investigators. N.Y. Times, Dec. 4, 1980, §1, at 1, col. 1. Also approved is the use of clergymen, lawyers, physicians and journalists as informers.

ing whether this illegal conduct breached the valued "restraint" provided by the due process guaranty, Justice Brandeis's warnings, in *Olmstead* v. *United States*, 277 U.S. 438, 471, 479, should be carefully reviewed:

> Men born to freedom [should be] naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding.

It is now left to this Court to review the government's criminal behavior and determine whether the Fifth Amendment's guarantee of due process of law protects our citizenry against such "insidious encroachment" of our liberty.

## B. UNLESS THE HOLDING IN UNITED STATES v. PAYNER IS RECONSIDERED THE UNITED STATES COURTS WILL BECOME UNWILLING ACCOMPLICES IN THE PERPETRATION OF UNLAWFUL ACTS OF GOVERNMENT AGENCIES.

This Court should reconsider the holding in *United States* v. *Payner* and confirm specific standards for the exercise of supervisory powers. Otherwise, *Payner* will stand as an imprimatur to Executive abuse in the ostensible enforcement of the law. This Court has a duty to protect the integrity of the federal judicial system and deter bad faith law enforcement and, thereby deny the government the fruit of its conscious criminal conduct. In no other way can the administration of justice be protected from the Machiavellian attitude that government criminal conduct should be rewarded.

In *Payner*, this Court abdicated *any* supervisory control over the Executive Branch as long as some third party is the object of the Government's criminal act, even

though the *exclusive* reason for such bad faith criminal conduct is to obtain evidence for use in the courts it has sworn to protect.

The *Payner* decision invites lawless and reckless misconduct by alleged officers of the law. In fact, encouraged by its invitation to act, the Executive Branch has already implemented directives to take advantage of *Payner*-type abuses.[6]

To define this Court's authority to suppress as being exclusively within the confines of the Fourth Amendment critically admits that this Constitutional Court has *no* inherent powers to protect the integrity of the very evidence presented in its courts. While the Court acknowledged that this "intentional manipulation of the standing requirements of the Fourth Amendment by agents of the United States" was "most disturbing," it nevertheless totally disregarded such concern in reaching its conclusion. In the district court, Judge Grady aptly defined the issue: "has this Court been made an unwilling accomplice in the perpetration of unlawful acts by a government agency by allowing the processes of this Court to be used for the presentation of evidence derived through such conduct?" (App. 88)[7]

Numerous decisions have suppressed evidence, reversed convictions or remanded cases for sentencing, not on the basis of Fourth or Fifth Amendment constitutional grounds, but premised on supervisory powers to protect

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[6] See p. 12, n. 5, *supra*.

[7] Citation is to the Appendix filed in the United States Court of Appeals for the Seventh Circuit.

judicial integrity and to deter unlawful governmental conduct.[8]

The government has sought to impugn the integrity of federal judges by questioning their ability to exercise supervisory powers in suppressing evidence. Rather than setting forth specific and limited standards for the exercise of such authority, this Court has adopted the Executive's alleged concern over "standardless discretion." *United States* v. *Payner*, ..... U.S. ....., and of necessity has chosen to rely on the legal integrity of the Executive investigators over the federal district and appellate judiciary.

The Seventh Circuit already has taken issue with the *Payner* decision and has suppressed the use of all evidence obtained pursuant to a search warrant exercised on a corporate defendant to obtain evidence against twelve individuals and two corporations. *United States* v. *Cortina*,

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[8] *Elkins* v. *United States*, 364 U.S. 206 (suppression of evidence); *Yates* v. *United States*, 356 U.S. 363 (sentencing); *Mallory* v. *United States*, 354 U.S. 449 (suppression of evidence); *McNabb* v. *United States*, 318 U.S. 332 (suppression of evidence); *United States* v. *Payner*, 590 F.2d 206 (6th Cir. 1979) (*per curiam*) (suppression of evidence); *United States* v. *Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. dismissed as improvidently granted* 436 U.S. 31 (violation of court rules); *United States* v. *Valencia*, 541 F.2d 618 (6th Cir. 1976) (government misconduct in placing an informant among defense attorneys); *United States* v. *Coast of Maine Lobster Co., Inc.*, 538 F.2d 899 (1st Cir. 1976) (prosecutorial publicity); *United States* v. *Cuomo*, 479 F.2d 688 (2d Cir. 1973) (violation of court rules); *United States* v. *Poole*, 379 F.2d 645 (7th Cir. 1967); (prosecutorial misconduct in suppressing favorable evidence); *United States* v. *Wiley*, 278 F.2d 500 (7th Cir. 1960) (sentencing); *United States* v. *Payner*, 434 F.Supp. 113 (N.D. Ohio 1977) (suppression of evidence); *United States* v. *Wedra*, 343 F.Supp. 1183 (S.D.N.Y. 1972) (suppression based on government deception).

630 F.2d 1207 (7th Cir. 1980). The basis for the exercise of supervisory powers was premised on the fact that a FBI agent *lied* in his search warrant affidavit. The Seventh Circuit distinguished *Payner* in its "standing" rationale by finding that the warrant was exercised against some, but not all of the named defendants. Emphasis was placed on the integrity of the federal courts and the government's attempt to manipulate judicial process. The Seventh Circuit asserted that to uphold the integrity of the judicial system, the suppression of all evidence resulting from the search must apply to *all defendants. Id. Accord, United States* v. *Valencia,* 541 F.2d 618 (6th Cir. 1976). As Judge Grady found in *Baskes,* the Seventh Circuit noted that to condone such a fraud would make the federal courts an accomplice in crime with the Executive and that unless the fruits of this lawless and reckless misconduct are suppressed, the Executive will not only be encouraged, but invited to continue in such wholesale crime. *Id.* at 630 F.2d 1214-17. As the Seventh Circuit aptly phrased it:

> "Unless we deter behavior such as [the agent's] that bulwark will become a Maginot Line, laughingly circumvented by those sworn to respect it. Courts must act in their own self-defense against brazen violations of their procedures. We must draw the line at misconduct occurring within our own house." 630 F.2d at 1217.

There is no legal or logical basis for this Court to conclude that it has somehow retained administrative supervisory powers over the federal courts and yet conclude that it has no supervisory authority to prohibit the use of criminally obtained evidence in the very court system it claims to have some authority to protect. As this court has stated, "the injury is not limited to the defendant—there is injury to the jury system, to the law as an institu-

tion, to the community at large and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195.

## CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 79-1774

UNITED STATES OF AMERICA,

*Petitioner-Appellant*

v.

ROGER S. BASKES,

*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-CR-238—John F. Grady, *Judge.*

Submitted September 15, 1980—Decided October 23, 1980

Before FAIRCHILD, *Chief Judge,* CUMMINGS and BAUER, *Circuit Judges.*

PER CURIAM. This court entered an order on August 6, 1980, directing the defendant to show cause why the order appealed from should not be summarily reversed and remanded in light of *United States* v. *Payner,* 48 U.S. L.W. 4829 (June 13, 1980). The district court had exercised its supervisory power to suppress evidence tainted

by the Government's violation of the Fourth Amendment rights of third parties and set aside the jury's verdict finding the defendant guilty of conspiracy to defraud the United States and of violation of the Internal Revenue laws. During the pendency of this appeal, the Supreme Court, in *Payner,* reversed a similar suppression order arising out of the identical search and seizure at issue in the present case. The district court had refused to ground its order on the theory that the use against defendant of evidence acquired as a result of the unlawful activity was a denial of due process. Defendant argued in its brief on appeal that the refusal was error, and that the due process theory was an alternative ground for affirmance. In response to our order to show cause, defendant maintains that his due process theory survives *Payner*. We disagree.

Although the due process issue was not raised in the petition for *certiorari* in *Payner* (presumably because the court of appeals did not decide that question), it had been considered by the district court, which had alternatively grounded its suppression order on that rationale, and was apparently briefed and argued before both the court of appeals and the Supreme Court. The unambiguous language of Justice Powell's majority opinion (48 U.S.L.W. at 4832, n. 9) and the majority's implicit rejection of the dissenters' preference (48 U.S.L.W. at 4835, n. 15 (Marshall, J., *dissenting*)) that the case be remanded to the court of appeals for consideration of the due process issue leave no doubt that a majority of the justices considered the question properly before the Court and decided it adversely to Payner. That being so, the position of the Supreme Court is clear: "even if . . . the unlawful briefcase search was so outrageous as to offend fundamental ' "canons of decency and fairness," ' . . . , the fact remains that '[t]he limitations of the Due Process Clause . . . come

into play only when the Government activity in question violates some protected right of the *defendant*' " (48 U.S. L.W. at 4832, n. 9) (citations omitted; emphasis in original). We deem oral argument unnecessary. Because the defendant cannot show that his rights were violated by the Government activity, indeed, because the present case is indistinguishable from *Payner*, the order appealed from is reversed and the case remanded to the district court for further proceedings.

REVERSED AND REMANDED.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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UNITED STATES OF AMERICA,
Plaintiff,

v. NO. 77 CR 238

ROGER S. BASKES,
Defendant.

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### ORDER SUPPRESSING EVIDENCE AND SETTING ASIDE JURY VERDICT

For the reasons stated at the conclusion of the oral arguments on the motion to suppress held on June 13, 1979, the court, in the exercise of its supervisory powers suppresses the following evidence:

1. The testimony of William Goldstandt.

2. The testimony of Melvin Garb and Harold Stern.

3. All evidence, testimonial and documentary, concerning any commodities trading through the II Williams accounts.

4. All other evidence of whatever kind derived directly or indirectly from leads obtained by the Government from the briefcase or the Rolidex.

It is further ordered that the verdict of the jury finding the defendant Roger Baskes guilty is set aside.

DATED: June 14, 1979.

ENTER: */s/ John F. Grady*
United States District Judge